

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 25 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 06-31322
)	
Erin L. Porter,)	Chapter 13
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

ORDER SUSTAINING OBJECTION TO CERTIFICATION

This matter is before the court on the objection (“Objection”) [Doc. # 15] filed by Sun Communities Operating Limited Partnership (“Sun”) to Debtor’s Certification filed pursuant to 11 U.S.C. § 362(l)(3) (“Certification”) [Doc. # 8]. The court held a hearing, which was attended by counsel for Sun and for Debtor, on June 28, 2006. For the reasons that follow, Sun’s Objection will be sustained.

STATUTORY BACKGROUND

A statutory automatic stay arises upon the filing of a bankruptcy petition. 11 U.S.C. § 362(a). Section 362 of the Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), effective October 17, 2005. Debtor’s Certification and Sun’s Objection require application of the following newly enacted provisions of that section that address certain exceptions to application of the stay imposed under § 362(a):

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

.....

(22) subject to subsection (1), under subsection (a)(3), of the continuation of any

eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor. . . .

....

(1) (1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that –

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor . . . has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor . . . complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor . . . has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3) (A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A) –
(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and
(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

11 U.S.C. § 362 (b)(22) and (1).

Under these provisions, the filing of a bankruptcy petition does not operate as an automatic stay of the continuation of an eviction action if a lessor has obtained a judgment for possession of the residential property before the petition was filed unless the debtor files with the court and serves upon the lessor a

certification, under penalty of perjury, that (1) the applicable nonbankruptcy law permits her to cure the entire monetary default after the judgment for possession was entered and (2) the debtor has deposited with the clerk of court any rent that would become due during the 30-day period after the petition was filed. *See* 11 U.S.C. § 362(1)(5)(B). If such certification is made, the eviction action is stayed for a period of 30 days, during which the debtor may cure, under applicable nonbankruptcy law, the entire monetary default. If debtor succeeds in curing the entire default during that 30-day period, the eviction action will continue to be stayed if the debtor files with the court and serves on the lessor a certification that the default has been cured.

However, if the lessor files an objection to the debtor's certification, the court must hold a hearing to determine whether debtor's certification is true. Neither the statute nor the Bankruptcy Rules address the parties' burdens with respect to proving the truth of the certification. The required deposit with the clerk of court of rent that will become due will, of course, be a matter of record that can easily be determined. And the court finds that, after a timely objection, it is the debtor's burden to demonstrate a right to cure under nonbankruptcy law. If the lessor's objection is sustained, § 362(b)(22) immediately applies and the eviction proceeding is excepted from the automatic stay provisions of § 362(a).

FACTUAL BACKGROUND

The following facts are not disputed. Sun is the owner and operator of a manufactured home park in which Debtor leased a lot located at 5702 Angola Road, Lot # 278, Toledo, Ohio. Debtor is in default of her rent payment to Sun and, on May 27, 2006, Sun obtained from a state court a judgment for possession of the residential leasehold premises. Debtor does not dispute that her rent is in default or that Sun has not accepted any rent after obtaining the judgment for possession.

On June 5, 2006, Debtor filed a petition under Chapter 13 of the Bankruptcy Code. In her petition, she certified that (1) Sun had obtained a judgment of possession of her residence, (2) she is claiming that under applicable nonbankruptcy law she would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered, and (3) she has deposited with the court any rent that would become due during the 30-day period after her petition was filed. [Doc. # 1, p. 2]. As required by the statute, Official Form B1 (Voluntary Petition) was amended effective October 2005 to include a pre-printed section designed to address the newly enacted § 362(1). 11 U.S.C. § 362(1)(5)(C). This section of the form is a box titled Statement by Debtor Who Resides as a Tenant of Residential Property, and has three boxes to be checked if applicable plus lines to add the landlord's name and address. The Voluntary Petition form is signed by a debtor under penalties of perjury. Debtor's

certification on the Voluntary Petition form she filed in this case has all three boxes checked and both lines filled out. This certification, however, was not served on Sun. Instead, Sun was served by Debtor with a copy of her petition, signed by her, that includes only the first and third certifications. It did not certify that she is claiming that applicable nonbankruptcy law permits her to cure her default after entry of a judgment of possession.

On June 6, 2006, Debtor filed a document captioned “Certification of Intent to Cure Entire Monetary Default that Gave Rise to the Judgment for Possession” (“Certification of Intent to Cure”) that is signed only by Debtor’s attorney. [Doc. # 8]. In this document, Debtor states that she proposes to cure the full arrearage of lot rent owed to Sun through her Chapter 13 plan and that because she is depositing one month’s lot rent with the clerk of court, the automatic stay should extend past thirty days. Sun filed a timely objection on June 12, 2006.

DISCUSSION

In this case, Sun’s arguments raise two issues: (1) whether Debtor has complied with the certification requirement under § 362(l)(1); and (2) whether applicable nonbankruptcy law, in this case, Ohio law, permits Debtor to cure her monetary default after entry of the judgment of possession in Sun’s favor. The court finds in favor of Sun as to both arguments.

With respect to the certification requirement, if Debtor did not satisfy the requirements under § 362(l)(1), then § 362(b)(22) applies and the eviction proceeding to which she was a party is not subject to the automatic stay. Section 362(l)(1) required Debtor to certify *both* that she is claiming that applicable nonbankruptcy law permits her to cure her default and that she deposited the rent that will become due within thirty days with the clerk of court. In addition, it requires that the certification be made under penalty of perjury and that the certification be served on Sun. Debtor’s certification that was served on Sun was deficient in that it certified only that she had deposited with the clerk of court the rent that would become due within thirty days. It did not certify that she was claiming a right to cure her default under applicable nonbankruptcy law. The Certification of Intent to Cure filed by Debtor on June 6, 2006, does not cure her deficient certification as it is not signed by Debtor. As such, Debtor did not satisfy the requirements under § 362(l)(1).

Even if Debtor’s certification complies with the statute, Sun also argues that Debtor’s certification is not true because Ohio law does not permit Debtor to cure her entire monetary default after entry of a judgment of possession. The language of subsection 362(l)(1)(A) as to the required certification under penalty of perjury and the language of subsection 362(l)(5)(B)(ii) as to the form of the certification in the

petition are subtly different. Among other differences, the former requires a debtor to certify that there are circumstances under applicable nonbankruptcy law that permit cure of the entire monetary default and the latter requires the form of the certification to state only whether a debtor is *claiming* under paragraph 362(l)(1) that such circumstances exist. Insofar as the right to cure, it is clearly true that Debtor *claims* circumstances providing a right to cure; therefore, one might be tempted in furtherance of discerning the “plain meaning” of the statute to find that her certification is “true,” which is the inquiry mandated by the statute. 11 U.S.C. § 362(l)(3)(A). The court does not have an answer for why the subtle differences in language exist between subsection 362(l)(1)(A) and subsection 362(l)(5)(B)(ii) or why Congress chose to address the form and content of the certification in two different places or even why Congress chose to have a debtor “certify” under penalty of perjury what appears to be a question of law or, at best, a mixed question of fact and law.¹ Ultimately, the court believes that, in requiring the court to determine whether a debtor’s certification under subsection 362(l)(1)(A) is “true,” Congress is simply directing the court to determine whether the court finds that circumstances exist under applicable nonbankruptcy law under which a debtor would be permitted to cure the entire monetary default.

Debtor cites Ohio Revised Code § 1923.03, which provides that judgments under the Ohio Eviction Act “are not a bar to a later action brought by either party,” for the proposition that state law does not preclude her filing a Chapter 13 petition and, thus, that she can cure her default through a Chapter 13 plan. Debtor’s argument fails for two reasons. First, § 1923.03 simply does not address Debtor’s ability to cure a monetary default after a judgment of possession has been entered. The fact that it does not preclude Debtor from filing a Chapter 13 petition is of no consequence since it is Congress, not the Ohio legislature, that determines a Debtor’s eligibility to file a bankruptcy petition. Second, Debtor may cure her default only if nonbankruptcy law permits her to do so. However, she is really relying on bankruptcy law, not Ohio law, to allow her to cure her default in her Chapter 13 plan.

At the hearing, Debtor also relied on *Gallatin Housing Auth. v. Talley (In re Talley)*, 69 B.R. 219 (Bankr. M.D. Tenn. 1986), in which the court found that a debtor could cure her default in payment of rent after a judgment for possession had been entered but before a writ of ejectment had been served on the debtor. However, *Talley* is a pre-BAPCPA case in which the court interpreted and applied the provisions of § 365 of the Bankruptcy Code, specifically, that “the trustee may not assume [an unexpired lease of the debtor] unless, at the time of assumption of such . . . lease, the trustee . . . cures . . . such default.” 11 U.S.C.

¹This kind of certification is very different than the required certification of the fact that rent has been deposited .

§ 365(b)(1). While that provision may be applicable to the assumption of a nonresidential lease, under the BAPCPA amendments, Debtor may cure her default in rent payments under her residential lease only if *nonbankruptcy* law permits her to do so.

Debtor does not rely on any contractual right to cure breaches that, under certain circumstances, are recognized under Ohio law. *See* Ohio Rev. Code § 3733.11(L) (providing that a manufactured home park operator and tenant may include in a rental agreement any terms and conditions that are not inconsistent with or prohibited by any other rule of law); *Quill v. R.A. Investment Corp.*, 124 Ohio App. 3d 653 (1997) (recognizing a tenants right to cure its breaches as provided in its lease). Also, Debtor does not rely on any rights that may vest in her as a result of Sun accepting payment of rent after attempting to terminate the lease. *See Fairborn Apartments v. Herman*, 1991 WL 10962, *4 (Ohio App. Jan. 31, 1991) (stating that, “[i]n Ohio, a lease cannot be forfeited for nonpayment of rent if the landlord accepts the delinquent tenant’s attempt to cure the default by tendering rent”). It is undisputed that Sun has not accepted any rent after entry of the judgment of possession.

The court thus cannot find in this case that there are any circumstances under applicable *nonbankruptcy* law under which the Debtor would be permitted to cure the entire monetary default that gave rise to the state court order of possession. As a result, the court cannot find that Debtor’s certification is “true” as the court has interpreted Congress’ directive in § 362(1)(3)(A).

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Objection [Doc. #15] be, and hereby is, **SUSTAINED**. The clerk of court shall immediately serve upon both the lessor, Sun Communities Operating Limited Partnership, and Debtor a certified copy of this order.